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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MISSOURI DIVISION OF EMPLOYMENT SECURITY
and C. BRUCE CORNETT,

Petitioners,

VS.

WILMA HASE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether evidence from plaintiff's *prima facie* case which does not respond to the employer's asserted nondiscriminatory reason for the employment decision is sufficient to create a genuine issue of fact on the issue of pretext and relieve plaintiff from the burden of presenting evidence from which intentional discrimination can be inferred?

2. Whether an employment discrimination plaintiff can establish the fourth element of a *prima facie* case by demonstrating that she possesses the minimum qualifications for the position?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, the Missouri Division of Employment Security and C. Bruce Cornett respectfully pray that the court issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit in *Wilma Hase v. Missouri Division of Employment Security and C. Bruce Cornett*, 91-2422 (Aug. 12, 1992).

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported as *Wilma Hase v. Missouri Division of Employment Security*, 972 F.2d 893 (1992) and reprinted in the appendix hereto at A-3. The district

court's opinion is unreported and is reprinted in the appendix hereto beginning at A-14.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§ 1331 and 1343, the respondent brought this suit in the Western District of Missouri. On June 3, 1991, the district court granted petitioners' motion for summary judgment. See A-14. On respondent's appeal the Eighth Circuit, on August 12, 1992,. entered an opinion reversing the judgment entered by the district court and remanding the cause. See A-3. A timely petition for rehearing or rehearing en banc was filed on September 8, 1992 and was denied on October 21, 1992. See A-2. On petitioners' application the deadline for filing this petition was extended to February 8, 1992. A-1. The jurisdiction of this court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Wilma Hase, a fifty-seven year old white woman, filed her lawsuit alleging age and sex discrimination against the Missouri Division of Employment Security (DES) and Bruce Cornett, its director, because they promoted Wendel Otey, a thirty-seven year old black male, and failed to promote her to an Employment Security (E.S.) Manager I in the Mexico, Missouri DES office. The E.S. Manager is the person who supervises the employees in the Mexico office. DES is the agency charged with administering Missouri's unemployment compensation system and assisting the unemployed pursue employment. After the parties undertook written discovery and after numerous depositions were taken, petitioners filed a motion for summary judgment. Hase responded to the motion submitting evidence in support of her claim. Thereafter, the district court granted summary judgment.

The evidence presented both for and in opposition to the summary judgment motion demonstrated the following. Cornett created an opening for an E.S. Manager I in the Mexico, Missouri office by promoting Lois Jean Drigalla, a woman over forty (40) who held that position, to a position in the Central Office. R 81, 146-47, 222.[1] The Division of Personnel, an agency separate from DES, created a register of individuals interested in and eligible for the E.S. Manager I position and ranked these individuals based on their test scores. R 113, 301. The Division of Personnel has no personal knowledge of any candidate's ability to perform the job for which they are competing. R 90-91. Cornett was free to select anyone among the top ten on the list of eligibles, R 69-72, 90, and the test scores were not considered important by Jack Meystrik, the District Director of DES, who advised Cornett on personnel matters. R 137.

There are three individuals on the list of eligibles for the E.S. Manager position that warrant specific discussion. Timothy Clay was a thirty-eight (38) year old male who appeared first on the list of eligibles. R 64, 301. His test score was an 88 (R 301) and he had held one supervisory position in the 18 pay range for over four years at the time of the promotion decision. Clay's performance rating was "high successful." R 304. The E.S. Manager position which Hase sought was in pay range 21. R 64.

Hase was a fifty-seven (57) year old white woman who appeared third on the list of eligibles. R 64, 299, 301. Her test score was 84.9 (R 301) which was increased to 85.9 (R 303) considering her "highly successful" performance rating. R 303-04. There is no evidence in the record concerning any increases the other individuals on the list of eligibles may have received. Hase had never held a supervisory position in DES. R 226-27. Rather, she was an E.S. Technician in pay range 15. R 64.

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[1] Citations to the record ("R") contained in this petition are made for the convenience of the court and refer to the Joint appendix filed in the Eighth Circuit Court of Appeals.

Finally, Otey was a thirty-seven (37) year old black male who appeared sixth on the list of eligibles. R 64, 301. His test score was 84.0. Otey had held supervisory positions for over three years at the time of the promotion decision. R 64. Otey was in pay range 20. R 64. Otey had been in supervisory positions with DES longer than any other eligible except Clay. R 64. Prior to the promotion decision, Otey had occupied the position of E.S. Supervisor I in the Mexico, Missouri office for a few months. R 132, 149. Otey began his employment with DES in 1973 as an E.S. Technician in the St. Charles, Missouri office. R 162. During that time Otey was the technician in charge of the Work Incentive Program and supervised another technician and a clerk. R 163. Otey was promoted to Job Corps Supervisor in 1983. R 165. Otey's role as Job Corps Supervisor was to perform training and functional supervision of fifty-six screeners throughout the State. *Id.* After two years, Otey was assigned to the Productivity Review Team which traveled to local offices to make sure they were operating their employment security operation according to regulation. R 168. This was a "supervisory position." R 169. Otey stayed with the Productivity Review Team for three months and was then promoted to a Supervisor II in the Dislocated Worker Program which concerned the hard-core unemployed. R 170. In this position Otey supervised twenty local staff people. R 171. In fulfilling the obligations of his supervisory positions Otey trained new staff, updated training for existing staff, worked with screeners, answered questions from the employees he supervised and critiqued the way particular files had been handled. R 184-85. Otey had contact with Meystrik through the supervisory positions he had in Central Office. R 178-79. Cornett promoted Otey to the position of E.S. Manager I in the Mexico office. R 86.

During Cornett's tenure as Director of DES, the number of employees was reduced approximately forty-four percent. R 71. In making employment decisions, Cornett relied on recommendations from DES personnel. R 69-71, 73-75. Prior to making

promotion recommendations, Jack Meystrik would receive input from district managers and, at times, the local managers. R 118. There was no written requirement that applicants receive personal interviews with Cornett or any other individual involved in the recommendation or selection process (R 70-71, 84), nor was there a requirement that their job performance ratings or personnel files be reviewed. R 122-24. This was necessitated by the sheer number of personnel decisions to be made (R 74-75) and constituted a recognition that the persons making the recommendations had an incentive to select the best person available because they had to live with the appointed person's performance. R 84.

Meystrik recommended Otey for the E.S. Manager I position in Mexico, Missouri. R 138. He did so because Otey had been the supervisor of three people in the Mexico office (R 132), was a programmatic supervisor, and had varied experience allowing him to understand "what the bigger picture is with the Division." R 138-39. Meystrik discussed Otey's appointment with the district manager, Don Lee, in Mexico and he concurred. R 139.

Meystrik knew Otey and Hase. R 126, 143. Meystrik knew that Otey was Program Supervisor of the Job Corps and E.S. Supervisor in Mexico, Missouri (R 127). Otey had programmatic supervision (technical assistance and direction on operational aspects) of Job Corps screeners. Otey directed these individuals, reviewed their document preparation, provided training, and reviewed their other work to determine if it was completed as required. R 129. Otey also had indirect supervision of local office managers to the extent that he could correct forms for local office use and dictate certain techniques that they needed to employ.

Cornett promoted Otey. Cornett selected Otey for the position of E.S. Manager I based on Jack Meystrik's recommendation and a consultation with another individual. R 91-92. Cornett did

not have a personal relationship with either Otey or Hase prior to the appointment. R 88, 93. Prior to Otey's appointment, Cornett was aware that Otey held the position of Supervisor II in the Job Corps program. R 88. In that position Otey monitored the performance of local offices and individuals that were doing recruitment; knew the rules, regulations and procedures; and assisted individuals who were having problems. R 88-89.

Meystrik considered the type of supervisory experience Hase may have had, where a technician takes over a particular function in an office for a period of time, as a "minor kind of supervision as compared to being assigned that particular responsibility for an ongoing period of time." R 149. Meystrik felt that Otey's experience as an E.S. Supervisor in Mexico for a few months would weigh more heavily than the "technician kind of supervision . . . in a local office" because Otey's role was in an appointed position and because he had "the mental responsibility to charge forth and make decisions . . . whereas the acting [supervisor] . . . can always refer off to the other supervisor or to the manager." R 149-50. Hase conceded that "it would be reasonable for a person making an appointment to consider prior experience in supervisory positions when making an appointment to a supervisory position." R 67-68, 111.

Hase was asked in her deposition why she believed she had been discriminated against. She answered: "Because I didn't get the job in Mexico." R 193. In fact, Hase testified:

> Q. Is it your contention that the fact that Mr. Otey may have been previously known to the appointing authority a factor in your claim that you were discriminated against on the basis of sex or age?
>
> A. Yes. It was one of the factors.
>
> Q. And how is it a factor?
>
> A. Because they knew he was male.

Q. But how does the fact that they knew he was male support your claim that that was a factor in the decision making?

A. Because I didn't get the job.

Q. And there is no other fact?

A. No.

Q. Is that also true for age?

A. Yes.

R 218-19. While Hase complained that she did not receive an interview, she acknowledged that she knew of no one who received an interview prior to Otey's selection. R 233. In fact, Hase was treated exactly like the other people, eight males (one of which had a higher test score), on the register who were not selected for the position. R 233-34. Hase admitted that it was possible that Otey received the E.S. Manager I position without age or sex discrimination. R 237-38.

During Cornett's tenure as the Director of DES, Cornett appointed sixty-two women and seventy-nine people over the age of forty to 158 openings. R 62. He appointed thirty-three women over the age of forty to supervisory positions. *Id.* He was able to remember the names of some women and some women over fifty-five he promoted to supervisory positions. R 80-83. Meystrik also testified that he recommended older women for promotions to supervisory positions. R 144-46. Specifically, Cornett promoted Lois Jean Drigalla from her position as an E.S. Manager I in Mexico to create the opening to which Otey was appointed. R 81, 146-47, 222.

The district court found that Hase had presented a *prima facia* case of sex discrimination but that Cornett stated a legitimate nondiscriminatory reason for the promotion—Otey's previous

work in "supervisory positions." A-17. The burden then shifted to Hase. The district court

> searched the depositions and exhibits filed both in support of and in opposition to defendants' motion for summary judgment. Nowhere has this Court been able to find any evidence, direct or indirect, that defendants' reason for selecting Mr. Otey rather than plaintiff for the Manager I position in the Mexico DES office is pretextual. Where a plaintiff in a discrimination case is unable to produce evidence from which a discriminatory impetus may be inferred, summary judgment must be granted in favor of defendants.

A-18. Said judgment was entered on June 3, 1991.

The Eighth Circuit agreed with the district court that Hase had established a *prima facia* case. The court explained that she had done so by showing that she was on the list of the top ten eligible candidates. A-8, n.1. This was the minimum qualification for the position. The circuit court, disagreeing with the district court, found that Hase had created a triable issue of pretext by demonstrating her "rank, her higher examination and performance ratings, and years of experience." A-9. None of this evidence addressed petitioners' assertion that Otey was promoted because he had previously held supervisory positions. The court found that disparate treatment cases are based largely on circumstantial evidence and the relative merit of the case depends on credibility. A-9. A panel of the Eighth Circuit reversed the grant of summary judgment on August 12, 1992. A dissent was filed as to the reversal of summary judgment on the age discrimination claim, A-9, and the circuit court declined to rehear the case en banc on October 21, 1992. A-2. Three judges voted to rehear the case. *Id.*

REASONS FOR GRANTING THE WRIT

The Court should grant this petition because the decision of the Eighth Circuit ignores the Court's holding concerning the appropriate function of summary judgments and removes any possibility that an employment discrimination defendant in a disparate treatment case can secure a summary judgment. The federal courts will be greatly burdened by trying every case of that type which is filed. Furthermore, the circuit court's opinion overlooks and attempts to eliminate the fourth element of a *prima facie* employment discrimination case created by this Court.

I.

THE COURT SHOULD GRANT THIS PETITION BECAUSE THE EIGHTH CIRCUIT'S DECISION, THAT SUMMARY JUDGMENT MUST BE DENIED WHEN A PLAINTIFF PRESENTS EVIDENCE OF HER MINIMUM QUALIFICATIONS FOR A PROMOTION WHICH DOES NOT ADDRESS THE LEGITIMATE REASON FOR THE EMPLOYMENT DECISION AND PLANS TO ATTACK DEFENDANTS' CREDIBILITY AT TRIAL, CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS AND THE ISSUE NEEDS TO BE RESOLVED IN ORDER TO ENHANCE THE EFFICIENCY OF EMPLOYMENT DISCRIMINATION LITIGATION.

Despite the Eighth Circuit's assertion to the contrary, it essentially concludes that summary judgment is never appropriate in disparate treatment cases when the employee establishes a *prima facie* case because the credibility of the employer's explanation always presents a issue for trial. This is a conclusion which will put the district courts and employment discrimination defendants to extraordinary and unnecessary effort, ignores the law concerning summary judgments, and violates Rule 1, Fed.R.Civ.P, requiring the courts to construe the Rules to secure a "just, speedy, and inexpensive determination of every action."

See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (plaintiff must present affirmative evidence sufficient to raise a dispute as to a genuine issue in order to defeat a proper motion for summary judgment even in cases where the defendant's credibility is an issue); *White v. McDonnell Douglas Corp.*, 904 F.2d 456, 458 (8th Cir. 1990) (employee has "burden to set forth affirmative evidence, specific facts, showing that there was a genuine dispute . . .").

The Court in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), established alternative standards by which an employment discrimination plaintiff can demonstrate pretext. Pretext can be demonstrated

> either directly, by persuading the court that a discriminatory reason more likely [than not] motivated the employer, or indirectly, by showing that the employer's proffered explanation is unworthy of credence.

450 U.S. at 256, 101 S.Ct. at 1095. "'Proof of discriminatory motive is critical' when disparate treatment is claimed." *Wilson v. Stroh Companies, Inc.*, 952 F.2d 942, 945 (6th Cir. 1992) quoting *International Broth. of Teamsters v. U.S.*, 431 U.S. 324, 335 (1977).

Here the court found that Hase's *prima facia* case contained sufficient information to raise a material issue of fact on her claim that petitioners' proffered reason for their employment decision was a pretext for discrimination. The evidence the court referenced was plaintiff's "rank, her higher examination and performance ratings, and her years of experience." A-9.

The notion that a demonstration of one's qualifications is all that is necessary to raise a triable issue of pretext has been rejected. In *Villanueva v. Wellesley College*, 930 F.2d 124 (1st Cir.), *cert. denied*, 112 S.Ct. 181 (1991), the First Circuit affirmed summary judgment against a tenure applicant. The

applicant's evidence on the issue of pretext "demonstrates that in some areas he may have been more qualified than the other candidates." *Id.* at 130. The court found that this evidence was insufficient because the other tenure applicants had other attributes which the plaintiff lacked. The court held,

> [the tenure applicant] was required to adduce sufficient evidence from which the trier of fact could conclude that [the employer's] articulated reason for the tenure decision was 'obviously weak or implausible,' or that the standards were 'manifestly unequally applied' . . . Introducing evidence that, at best, indicates that he was as qualified as other tenure candidates does not suffice.

Id. at 131 (citations omitted). The court goes on to note that none of the plaintiff's evidence "raises the slightest inference that a discriminatory motive lurked beneath the surface." *Id.*

The *Villanueva* court could easily have been discussing the evidence in the case at bar. Hase established that she was a member of two protected classes, she met the minimal qualifications for the position and she did not receive the position. She offered no evidence of her relative merits for the job and no evidence from which it can be inferred that petitioners' proffered reason for the selection of another candidate relating to those relative merits was a pretext. Petitioners promoted a different applicant to the open supervisory position because he had held previous supervisory positions including a supervisory position in the Mexico office for a short period of time. Hase conceded that prior employment in a supervisory position was a legitimate matter to consider in filing a supervisory position. There was no evidence of a discriminatory motive. In fact, Cornett demonstrated that during his tenure as director of DES, he appointed sixty-two (62) women (thirty-three of which were over forty years old) and seventy-nine (79) people over forty to fill one hundred and fifty-eight (158) supervisory openings. Specifi-

cally, Cornett promoted Ms. Drigalla from her position as the E.S. Manager in Mexico to create the opening Hase sought. In light of this evidence and Otey's supervisory positions, it cannot be said that Hase's evidence of her rank, examination score and performance ratings doing a non-supervisory job constitute sufficient evidence to raise an inference of employment discrimination. There was no evidence which even suggested that petitioners' employment decision was "obviously weak or implausible," under the *Villanueva* court's analysis, or that petitioners' proffered rationale for the employment decision was "unworthy of credence," under the *Burdine* standard.

The First Circuit does not stand alone. Consider *Mitchell v. Toledo Hosp.*, 964 F.2d 577 (6th Cir. 1992), where the employer was granted summary judgment on an employee's claim of race and age discrimination as a result of her discharge. The Sixth Circuit sustained the district court's finding that the employee failed to establish a *prima facia* case because she failed to show that she was similarly situated with the other employees she offered for comparison. The court then found that the employee offered no evidence from which pretext could be inferred. The court found that

> plaintiff's denial of the defendant's articulated legitimate reason without producing substantiation for the denial is insufficient for a race discrimination claim to withstand a motion for summary judgment.

Id. at 585.

The court in *Gibson v. American Broadcasting Companies, Inc.*, 892 F.2d 1128 (2nd Cir. 1989), provides a good example of the type of evidence from which pretext can be inferred. There Mr. Gibson claimed that he had not received certain assignments because of his race. The Second Circuit reversed a grant of summary judgment to the employer, finding that there was evidence from which the jury could infer pretext. The proffered

reason for not granting Mr. Gibson requested weekends off was that his performance was consistently the weakest of his peers. However, Mr. Gibson's peers were all fired for incompetence during the time Mr. Gibson was allegedly the weakest employee. Mr. Gibson further demonstrated that he was assigned air time during "prime time." It was this type of evidence, evidence which called into question the validity or credence of the alleged non-discriminatory reason, which was sufficient to create a material question of fact on the issue of pretext. *Id.* at 1134. The evidence cited by the court in the case at bar, Hase's rank, examination score, performance ratings, and longevity with the employer, do not call into question the asserted reason for Otey's selection for the supervisory position; that being Otey's three-year tenure in supervisory positions.

In *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, Nos. 91-1741 and 91-1780, slip op. (3rd Cir. December 30, 1992) 1992 W.L. 385463, a woman who was denied partnership in her law firm alleged that the denial was the result of sex discrimination. The law firm's reason for the partnership decision was plaintiff's perceived lack of legal analysis skills. The district court found that intentional discrimination had occurred after a review of the pliantiff's evaluations which "praised Ezold for skills other than legal analysis." *Id.* at 19. The Third Circuit rejected this approach and found that plaintiff's evidence must address the reason offered for the employment decision.

> Without such a limitation, district courts would be routinely called upon to act as members of an employer's promotion board or committee. It would subjectively consider and weigh all the factors the employer uses in reaching its promotion decision without the intimate knowledge of the history of the employer and its standards that the firm's decision-makers use in judging the degree to which a candidate exhibits a particular qualification that the employer has decided is of significance or primary importance

> in its promotion process . . .. It is not for the district court to determine that Ezold's skills in areas other than legal analysis made her sufficiently qualified for admission to the partnership.

Id. The Third Circuit reversed the district court and found that, after properly analyzing the evidence, the employer was entitled to judgment. *Id.* at 2. Even the Eighth Circuit has articulated the principle that a plaintiff's evidence on a claim of pretext must address the "employer's stated reason for discharging the employee . . .." *Frieze v. Boatmen's Bank of Belton*, 950 F.2d 538, 541 (8th Cir. 1991) (reversing district court's failure to enter judgment notwithstanding the verdict for an employer).

No evidence was submitted by Hase that would allow a reasonable juror to conclude that gender or age played a part in the selection of Otey. In fact, the record demonstrated that Clay, a thirty-eight year old man with performance ratings similar to Hase's and who ranked the highest on the register, did not receive the job. R 64, 301, 305.[2] The court correctly noted Cornett's unrebutted testimony that there was no significance to these rankings and that the test scores were irrelevant once the Division of Personnel compiled the list of ten candidates. A-5. The E.S. Manager position that Hase and Otey both sought had

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[2] The Eighth Circuit has previously recognized that the equal treatment of similarly situated people "undercuts" any inference of discrimination. In *Lanear v. Safeway Grocery*, 843 F.2d 298 (8th Cir. 1988), a discharged black employee alleged discrimination in his discharge because a white employee with at least a different level of involvement in a fraudulent time card scheme was not discharged. The court rejected the employee's arguments, noting that a white employee the plaintiff used for comparison was not "similarly situated in all relevant respect," *Id.* at 301, and that a white employee with the same level of involvement as the plaintiff was also discharged. Here Hase was treated just the same as Clay. Both were passed over for the position though they both had higher rankings than Otey. However, neither one of them had Otey's experience in supervisory positions. R 64.

a pay grade rating of 21. Hase's position at the time she sought the promotion had a pay grade rating of 15, while Otey's pay range prior to the promotion was 20. To the extent that salary within an organization reflects to some degree the organization's evaluation of an employee, Otey sought only a small promotion while Hase sought a substantial one. Hase conceded that it was "possible that someone lower ranking than you who got the job got it on the basis of qualifications and not on the basis of sex or age discrimination." R 237. Hase could not offer "any reason to believe that [she was] treated any differently from the eight people who did not get the job" including Clay. R 234. She offered no evidence from which it could rationally be concluded that this possibility did not come to pass.

Consider *United Ass'n of Black Landscapers v. City of Milwaukee*, 916 F.2d 1261 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 1317 (1991). As Hase did below, the employee there offered no evidence from which pretext could be inferred and instead argued that summary judgment was generally inappropriate in employment discrimination cases. The court disagreed and noted that summary judgment

> is not always inappropriate simply because the case raises issues of motive and intent . . . . Even in discrimination cases, parties should not be subjected to the time and expense of trial when there are no material facts in dispute.

Id. at 1268 (citations omitted).

There are no material facts in dispute in this case. Otey was awarded the supervisory position because he had already occupied supervisory positions with this employer for a period of over three (3) years including an interim supervisory position in the Mexico office where both he and Hase sought a permanent supervisory assignment. Hase concedes that she has never held a supervisory position (R 227) and that it is proper to consider

one's employment in a supervisory position when promoting someone to a supervisory position. R 241.

When this evidence is considered with the fact that the position which Hase sought was available because Cornett had promoted an older woman to create the opening (R. 146-47, 222), there is no evidence from which a reasonable juror could infer that petitioners' decision to offer a current supervisor another supervisory position was a pretext to hide discrimination. *Reed v. AMAX Coal Co.*, 971 F.2d 1295 (7th Cir. 1992).

The Eighth Circuit notes that summary judgment was inappropriate here

> because this disparate treatment case is based largely on circumstantial evidence and the relative merit of each party's case depends significantly on credibility.

A-9. This statement reflects the circuit court's faulty logic. On motion for summary judgment the evidence must be sufficient to raise an inference from which discrimination can reasonably be drawn by a factfinder. Hase's evidence—her rank, test score (less than one point higher than Otey's) performance evaluations doing a non-supervisory job and longevity, and her suggestion that a jury must be permitted to evaluate petitioners' credibility, does not meet this burden. If the Court concludes that Hase discharged her burden, no employment discrimination defendant will ever secure summary judgment in a case where the plaintiff establishes a *prima facia* case and the trial dockets of the federal courts will be crowded with employment discrimination cases which should be disposed of on summary judgment.

II.

THE DECISION OF THE EIGHTH CIRCUIT, THAT THE FOURTH ELEMENT OF A *PRIMA FACIE* CASE OF EMPLOYMENT DISCRIMINATION IN A PROMOTION CONTEXT CAN BE ESTABLISHED BY SHOWING ONLY THE MINIMAL QUALIFICATIONS FOR THE JOB SOUGHT, CONFLICTS WITH THE DECISIONS OF THIS COURT, OTHER CIRCUIT COURTS AND UNDERMINES THE RATIONALE FOR THE PRESUMPTION CREATED BY A *PRIMA FACIE* CASE.

The Eighth Circuit in this case reviewed and agreed with the district court's conclusion that Hase had established a *prima facie* case of age and sex discrimination. In so concluding, the court misstates the record, creates a rule which conflicts with other circuits and misconstrues significant issues.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court established the elements of a *prima facie* employment discrimination case. The Court articulated the fourth element of a *prima facie* claim of discrimination as a showing "that, after his rejection the position remained open and the employer continued to seek applicants from persons of *complainant's qualifications*." *Id.* at 802, emphasis added. Thus, the Supreme Court required the employment discrimination plaintiff to demonstrate qualifications at least equivalent to those individuals whom the defendant seeks to employ.

The plaintiff's *prima facie* burden

> serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection.

Burdine, 450 U.S. 248, 253-54 (1981). Only by the *prima facie* case's elimination of these common nondiscriminatory reasons can the *prima facie* case appropriately raise an inference of

discrimination. See *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978) "[a] *prima facie* case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors"). Included within these nondiscriminatory factors the *prima facie* case is intended to eliminate is "an absolute *or relative* lack of qualifications." *International Broth. of Teamsters v. U.S.*, 431 U.S. 324, 358, n. 44 (1977). Any other result would mandate an inference of discrimination without a consideration of the relative merits of the applicants for the position. No inference of discrimination should be permitted without some consideration of the relative qualifications of the candidates because to do so creates a preference for those in protected classes. Thus, in *Teamsters* the Court indicated that the employment discrimination plaintiff cannot establish a *prima facie* case absent a showing of her relative qualifications. *Id.* at 358, n. 44.

The fourth element of the *prima facie* case was explicitly considered in *Allen v. Denver Public School Board*, 928 F.2d 978 (10th Cir. 1991). There a guidance counselor filed a discrimination claim concerning her failure to receive a promotion to a college and career guidance counselor.

> In order to establish a *prima facie* case on this issue, [the plaintiff] must provide some evidence to establish "[s]he was equally or better qualified than those employees actually promoted."

Id. at 984 (citation omitted). The *Allen* court concluded that summary judgment was appropriate because plaintiff failed to discharge this burden.

In *Barnes v. GenCorp, Inc.*, 896 F.2d 1457 (6th Cir.), *cert. denied*, 111 S.Ct. 211 (1990), several employees brought an age discrimination case. The Sixth Circuit sustained summary judgment against several employees, finding that they had not

presented a *prima facie* case. After quoting *Teamsters*, the court observed that a plaintiff in a reduction of force case who had proven that he was qualified for the position, in the protected class, and discharged had introduced no evidence

> sufficiently probative to allow a fact-finder to believe that the employer intentionally discriminated against the plaintiff because of age.

Id. at 1466. The court held that the plaintiff

> could establish a *prima facie* case by showing that he or she possessed qualifications *superior* to those of a younger coworker working in the same position as the plaintiff.

Id. (emphasis added). By establishing superior qualifications, the plaintiff discharges the burden imposed by the fourth element of the *prima facie* case and articulated in *Teamsters*.[3]

Hase produced no evidence that she was equally or better qualified than Otey. Rather, the court found, in its footnote 1,

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[3] The Tenth and Sixth Circuits do not stand alone in requiring an employment discrimination plaintiff to demonstrate their relative qualifications for the job sought. In *Menard v. First Sec. Services Corp.*, 848 F.2d 281 (1st Cir. 1988), an age discrimination plaintiff alleged he was discharged in favor of a younger employee. "To establish that he was 'qualified' a complainant must show 'that he was doing his job well enough *to rule out the possibility* that he was fired for inadequate job performance, absolute or relative." *Id.* at 285 (emphasis in original), quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 (1st Cir. 1979). In an attempt to establish his qualifications, plaintiff presented the affidavit of his immediate supervisor which stated that plaintiff was doing an excellent job and had received positive evaluations for the time period at least one year prior to his firing. The court, sustaining the district court's grant of defendant's motion for summary judgment, found this evidence insufficient to establish plaintiff's "qualifications" for the job, i.e., insufficient "to rule out the possibility that he was discharged for inadequate performance" because the affiant was unaware of the plaintiff's recent employment problems. *Id.* at 287.

that Hase discharged her *prima facie* burden by demonstrating that she was minimally qualified for the position. A-8. Even the Eighth Circuit had previously agreed that in order to establish the fourth element of a *prima facie* case, the employment discrimination plaintiff must at least show that the "job remained open to others with qualifications *similar* to plaintiff's." *Adams v. Nolan*, 962 F.2d 791, 794 (8th Cir. 1992) (emphasis added). In light of *Teamsters*, this must be construed to mean similar relative qualifications, not merely that both candidates are at least minimally qualified.

Hase admitted that she had never held a supervisory position with DES, that Otey had, and that it would

> be reasonable for a person making an appointment to consider prior experience in a supervisory position when making an appointment to a supervisory position.

R 223-24. Hase introduced no evidence concerning her qualifications relative to those of Otey. Under such circumstances she has failed to state a *prima facie* case and summary judgment in petitioners' favor was required in light of the evidence they submitted.

In this case, it was established that Hase and Otey both met the minimal qualifications for the promotion. This does not satisfy the burden imposed in the *Teamsters* or *Allen* cases because it does not establish a permissible inference of discrimination. Consider *Wilson v. Stroh Companies, Inc.*, 952 F.2d 942 (6th Cir. 1992), where the court sustained the grant of summary judgment in an employment discrimination case. There the employer alleged that the employee was fired for rearranging work schedules in contravention of his employer's policies while the employee alleged a racial motive for termination. The court noted that the plaintiff, in order to establish his *prima facie* case,

> must produce 'evidence sufficiently strong to raise an inference that [the employer's conduct was] racially motivated'.

Id. at 945 (citations omitted). Hase offered no evidence from which a discriminatory motive can be inferred because her evidence failed to even suggest that her qualifications were "relatively" similar or superior to those of Otey. Hase had not held a supervisory position, a qualification which she admitted was valid. Otey had held more than one supervisory position.

Petitioners did not rely, as the court seems to suggest in its footnote 1, on an assertion that Otey had more supervisory *experience* than Hase. Rather, petitioners contend that Otey is relatively more qualified for the position because, unlike Hase, he has held supervisory *positions* within the DES.

This court should not allow the fourth element of the *prima facie* case to be construed as a requirement that an employment discrimination plaintiff need only show that she is minimally qualified for the job sought. The requirement, that an applicant demonstrate her relative qualifications for a promotion, serves the useful function articulated for it by the Court; it eliminates the most common nondiscriminatory reason for an employment decision. The Eighth Circuit's ruling undermines that function and will subject the federal courts to a flood of full-blown trials in frivolous discrimination cases.

Under the Eighth Circuit's analysis of the *prima facie* case, a presumption of employment discrimination would arise in the following situation. A small mid-western liberal arts college advertises for an English professor. The minimum qualifications for the position are a masters degree in American literature and one year of teaching experience. Applicant #1 is a professor with a masters degree in American literature from a university with an average reputation and one year of teaching experience. Therefore, she meets the qualifications for the position. Appli-

cant #1 is a fifty-seven year old female who has excellent references. The college, however, offers the position to a different applicant who has a Ph.D. in American literature from a well respected university and ten years teaching experience. Applicant #2 is a thirty-seven year old male. Applicant #1 sues for employment discrimination. Under the Eighth Circuit's analysis in the case at bar, Applicant #1 has established a *prima facie* case of discrimination because she has demonstrated the minimum qualifications for the position. The presumption imposed by the *prima facie* case is effective, despite the fact that Applicant #1 is not as relatively qualified for the position as the other applicant. Furthermore, Applicant #1 has successfully labeled the college an employment discriminator until the college rebuts her claim. This is an unacceptable outcome and not one consistent with this Court's opinions. In order to survive a motion for summary judgment in an employment discrimination case plaintiff must be required to demonstrate, as part of her *prima facie* case, that she has equal or superior qualifications for the position sought. In deciding otherwise, the Eighth Circuit requires federal courts and employers to endure substantially more employment discrimination trials than the decisions of this Court, other circuit courts and logic require.

CONCLUSION

Petitioners urge this Court to clarify the state of the law regarding the issues presented in this case and respectfully request this Court to grant a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF THE UNITED STATES

No. A-531

Missouri Division of Employment Security
and C. Bruce Cornett,
Petitioners,

v.

Wilma Hase

ORDER

[Received: Oct. 26, 1992]

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including February 8, 1993

/s/Harry A. Blackmun
Associate Justice of the
Supreme Court of the United States

Dated this 11th
day of January, 1993.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2422WMJC

Wilma Hase,
Appellant,

vs.

Missouri Division of Employment Security, et al.,
Appellees.

Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge Fagg, Judge Bowman and Judge Hansen would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

October 21, 1992

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2422

Wilma Hase,
Appellant,

v.

Missouri Division of Employment Security;
John Doe, I; C. Bruce Cornett,
Appellees.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: January 9, 1992
Filed: August 12, 1992

Before RICHARD S. ARNOLD, Chief Judge, THEODORE McMILLIAN, Circuit Judge, and HARRY W. WELLFORD,* Senior Circuit Judge.

McMILLIAN, Circuit Judge.

Wilma Hase ("Plaintiff") appeals from a final judgment entered in the District Court for the Western District of Missouri granting summary judgment in favor of the Missouri Division of Employment Security ("DES") and DES Director Bruce Cornett (collectively, "Defendants"). *Hase v. Mo. Div. of Employment Sec.*, No. 89-4106-CV-C-5 (W.D. Mo. June 3, 1991). Plaintiff alleged that Defendants discriminated against her on the basis of her age, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.A. § 623 (West 1985 & Supp. 1992),

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* The Honorable Harry W. Wellford, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

and on the basis of her gender, in violation of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C.A. § 2000e (West 1985 & Supp. 1992). For reversal, Plaintiff argues that there were genuine issues of material fact and consequently that the district court erred in granting summary judgment. For the reasons discussed below, we reverse and remand the case to the district court for further proceedings consistent with this opinion.

Background

When a vacancy opened in 1987 for the "Employment Security Manager I" position at the DES office in Mexico, Missouri, the Personnel Division of the Missouri Office of Administration prepared a list of ten eligible candidates, in accordance with state law. *See* Mo. Rev. State § 36.030 (1978 & Supp. I 1991). Plaintiff was the only female candidate on the list and at age 57 she was one year short of being the oldest. Plaintiff had worked for DES for 29 years and had held the positions of "Employment Security Deputy I," "Employment Security Deputy II," "Claims Technician" and "Employment Security Technician." Based on her examination rating of 84.9, Plaintiff was ranked third on the candidate list. After considering her job performance evaluations, however, the Personnel Division increased her score and moved her to second on the list. Her average performance rating for 1981 through 1985 was 91.8 percent, which put her in the "Outstanding" category.

Wendell Otey, at age 37, was tied with one other candidate as the youngest on the list. Otey had worked for DES for 13 years and had held the positions of "Employment Security Deputy I," "Employment Security Technician," "Employment Security Supervisor I" and "Employment Security Supervisor II." From 1981 through 1987 his job performance ratings were consistently lower than Plaintiff's, and his average rating for 1981 through 1985 was 89 percent, which put him in the "Very Good" category. His examination rating was 84.

Defendant Cornett promoted Otey. Cornett testified in his deposition that he did so because two assistant directors, including Assistant Director for Field Operations Jack Meystrick, had recommended Otey, and that he usually based his promotion decisions on such recommendations. Meystrick testified in his deposition that he had recommended Otey because Otey had held supervisory positions with DES. None of the positions Plaintiff held were considered supervisory.

Cornett testified in his deposition that he had believed that there was no intended significance to the ranking order of the candidates, that test scores were irrelevant once personnel compiled the list of ten candidates, and that he was free to choose anyone from the list. No written policies contradict Cornett's beliefs. According to an affidavit by Raymond W. McCann, the personnel officer for the DES, Cornett was DES director from 1982 through 1988. During that time, Cornett promoted 158 people at 13 supervisory levels. Sixty-two of those people were women, 79 were 40 years of age or older and 33 were women over 40.

Plaintiff brought this civil action alleging that Defendants failed to promote her because of her age, in violation of the ADEA, and because of her gender, in violation of Title VII. Defendants moved for summary judgment. The district court found that Plaintiff had established a prima facie case of age and gender discrimination, slip op. at 4, but that Defendants had articulated a legitimate, nondiscriminatory reason for failing to promote Plaintiff — namely, that Defendant Cornett selected Otey because Otey had supervisory experience with the DES, *id.* at 5. Concluding that Plaintiff failed to establish a basis for proving that Defendants' reason was pretextual, the district court granted summary judgment in Defendants' favor. *Id.* at 6. This appeal followed.

Discussion

We review a grant of summary judgment de novo, *United States ex rel. Glass v. Medtronic, Inc.*, 957 F.2d at 605, 607 (8th Cir. 1992), and we apply the same standards used by the district court, *Thelma D. by Delores A. v. Board of Educ.*, 934 F.2d 929, 932 (8th Cir. 1991). The question before the district court, and this court on appeal, is whether the record, when viewed in light most favorable to the non-moving party, show no genuine issue of material fact. Fed. R. Civ. P. 56(c). *See e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) ("*Anderson*"); *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir. 1990).

To withstand a motion for summary judgment, a party need not *prove* in its favor an issue of material fact. All that is required under Federal Rule of Civil Procedure 56(c) is sufficient evidence supporting a material factual dispute that would require resolution by a trier of fact. *Anderson*, 477 U.S. at 248-49 (quoting *First Nat. Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253 (1968)).

In the present case, the district court held that summary judgment was appropriate because Defendants articulated a legitimate, non-discriminatory reason for their employment decision. Plaintiff appeals, asserting that summary judgment is inappropriate because genuine issues of material fact concerning pretext need to be resolved.

The Supreme Court established a three-step framework in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) ("*McDonnell Douglas*"), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981) ("*Burdine*"), to analyze employment discrimination cases based on disparate treatment. Although *McDonnell Douglas* and *Burdine* dealt specifically with actions under Title VII, the guidelines they established are generally applicable to age discrimination actions as well. *E.g.*,

Tribble v. Westinghouse Elec. Corp., 669 F.2d 1193, 1196 (8th Cir. 1982), *cert. denied*, 460 U.S. 1080 (1983); *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 959 (8th Cir. 1978).

Under the first stage of the *McDonnell Douglas-Burdine* framework, the plaintiff has the burden of production to establish a prima facie case of discrimination. A plaintiff must generally demonstrate four elements to establish such a prima facie case: (1) that the plaintiff is a member of a protected class, (2) that the plaintiff meets the minimum qualifications for the position, (3) that the plaintiff suffered some kind of adverse employment action and (4) that the employer continued to try to fill the position from among applicants with plaintiff's qualifications. *See Burdine*, 450 U.S. at 253 n.6; *McDonnell Douglas*, 411 U.S. at 802 & n.13.

A plaintiff who establishes a prima facie case "in effect creates a presumption that the employer unlawfully discriminated against the employee," *Burdine*, 450 U.S. at 254, and the analysis reaches the second stage of the *McDonnell Douglas-Burdine* framework. In the second stage, the burden of production "shifts to the defendant 'to articulate some legitimate nondiscriminatory reason for the employee's rejection.'" *Id.* at 253, *quoting McDonnell Douglas*, 411 U.S. at 802.

A defendant who articulates a legitimate, nondiscriminatory reason overcomes the presumption of discrimination raised by the prima facie case, *United States Postal Serv. v Aikens*, 460 U.S. 711, 715 (1983) (quoting *Burdine*, 450 U.S. at 255), and the case must proceed to the third stage of analysis. At the third stage, the plaintiff must demonstrate that the defendant's proffered reason is mere pretext, "either directly, by persuading the court that a discriminatory reason more likely [than not] motivated the employer, or indirectly, by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. This burden "merges with the [plaintiff's] ultimate

burden of persuading the court that she [or he] has been the victim of intentional discrimination." *Id.*

Upon review of the record we agree with the district court that Plaintiff established a prima facie case of discrimination[1] and that Defendants articulated a legitimate nondiscriminatory reason not to promote Plaintiff. We disagree, however, that there was no genuine issue of material fact concerning pretext. Accordingly, we hold that the district court erred in granting summary judgment in Defendants' favor.

Defendants argue that the district court correctly found that Plaintiff did not provide evidence specifically establishing a genuine issue of material fact concerning pretext. Plaintiff contends that genuine issues of material fact concerning discrimination are in dispute whenever a plaintiff establishes a prima facie case of discrimination and the defendant offers a legitimate, nondiscriminatory reason for its employment decision. Consequently, Plaintiff argues that summary judgment in favor of a defendant is never appropriate once a plaintiff has established a prima facie case, even if there is no distinct evidence of pretext. We need not reach this issue, however, because the evidence in the present case presents a genuine issue of material fact concerning pretext.

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[1] Defendants note that Otey, unlike Plaintiff, had supervisory experience. Consequently, they argue that Plaintiff's prima facie case was in doubt because she failed to show that Defendant Cornett hired someone else with similar qualifications. We disagree. The *McDonnell Douglas-Burdine* framework does not require that Plaintiff show that she had qualifications identical to the person that the employer eventually hired. All she must show is that "the employer continued to seek applicants from persons of complainant's qualifications." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 n.6 (1981) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). Because Cornett was considering applicants from the list of the ten top candidates that the personnel department had deemed eligible — which included Plaintiff — we agree with the district court that Plaintiff established her prima facie case.

As the *Burdine* Court recognized, "[the plaintiff's initial evidence] and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." 450 U.S. at 255 n.10. Evidence of Plaintiff's rank, her higher examination and performance ratings, and her years of experience, when compared with Otey's supervisory experience and job recommendations, could reasonably lead a trier of fact to infer that Defendants' proffered reasons were pretextual.

Plaintiff does not merely assert that she has been discriminated against and that Defendants are not telling the truth. She provides evidence to challenge Defendants' articulated reason for their promotional decision. To grant summary judgment would be inappropriate on this record, especially because this disparate treatment case is based largely on circumstantial evidence and the relative merit of each party's case depends significantly on credibility. Consequently, we hold that there is a genuine dispute of material fact concerning the ultimate issue of discrimination.

Accordingly, we reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion.

WELLFORD, Senior Circuit Judge, concurring in part and dissenting in part.

While the issue is a very close one, I concur, with some trepidation, in the majority view on reversal of summary judgment on plaintiff's gender claim. I would, however, affirm the decision of the district court on Hase's ADEA claim.

This case presents the following undisputed facts. Of the ten persons considered for the position in question, only Hase was a

female. One of the males not selected was older than plaintiff and seven of the ten were over forty years of age. All but one had tenure of more than ten years, although plaintiff had the longest tenure by a considerable period. Another male under forty, who was not selected, had a much higher test score than plaintiff or Otey.[1] There was no evidence of any custom or practice in the Missouri Division of Employment Security to discriminate against persons on account of age, and customary promotion procedures were apparently followed in this case. Defendant Cornett testified, without contradiction, that no other employment discrimination claim, by reason of age or other improper grounds, had been successfully established by an employee during his nearly seven-year stint as Director of DES. He had promoted a number of women (as well as men) over the age of forty-five to open positions.

In her deposition, the following testimony was the only basis given by plaintiff for her contention that she had been discriminated against:

> Q. Well, I'm trying to find out the reasons why you think you've been discriminated [against] on the basis of your sex and I don't think that is something that is going to change over time so I'm trying to figure out what reasons you think that was a factor in the decision to promote.
>
> A. Because I don't think my qualifications were assessed based on the fact that I was a female.
>
> Q. Okay. And why don't you think that —
>
> A. Because my qualifications for the job were not considered.

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[1] Clay, the applicant with the highest score, had an 88, while Hase had an 84.9, and Otey had an 84.

Q. And why do you think that has anything to do with your gender?

A. Because I didn't get the job in Mexico.

Q. Okay. And is there anything else?

A. No.

Q. And why do you think you were discriminated against on the basis of your age?

A. The same thing.

Q. And there are no other reasons?

A. None that I know of.

In short, plaintiff maintained that she was discriminated against because she had the longest tenure of the candidates considered and had a high test score, but did not receive the job. She believed she was more qualified than Otey, who was selected, and that the selectors "knew me but they did not know me as well as they him." The only basis give by Hase relating to *age discrimination* was that Otey "was younger than me."

There is simply no *evidence* of age discrimination demonstrated here, and no reasonable inference can be drawn from plaintiff's proof in response to defendants' summary judgment motion to show that age discrimination played any part in the selection procedure.[2]

The court recently in *Goetz v. Farm Credit Serv.*, 927 F.2d 398 (8th Cir. 1991), affirmed a grant of summary judgment for the defendant in an age discrimination case brought by a forty-nine

---

[2] Plaintiff does mention — "just rumor" or "pure[ ] gossip" — that Cornett wanted "to get rid of all the old people." She conceded that he had appointed older women but claimed "he didn't consider my qualifications for the job."

year-old female who contested the selection of a thirty-five year-old female for the position in controversy. Goetz contended, as does plaintiff Hase, that defendant's given reasons for not selecting her were pretextual. While conceding that plaintiff could show pretext by direct or indirect means, this court held in *Goetz* that the plaintiff "had failed to present a genuine issue of material fact concerning whether the reasons proffered by [defendant] . . . were pretextual for age discrimination." *Id.* at 406. Plaintiff Goetz had worked for defendant for six years while the much younger selected person had been employed for only eight months and, in addition, plaintiff presented statistical evidence which she claimed supported an inference of discrimination by the defendant against persons over forty. *Id.* at 404-05. After discussing the plaintiff's burden of proof as established in *Haglof v. Northwest Rehabilitation, Inc.*, 910 F.2d 492 (8th Cir. 1990),[3] this court in *Goetz* sustained a district court's summary judgment of a factual record that seems to me stronger for plaintiff than does Hase's factual record. *See also Brousard-Norcross v. Augustana College Ass'n*, 935 F.2d 974 (8th Cir. 1991).

I would accordingly affirm the district court's decision on the ADEA claim.

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[3] I adopt the following observations in *Haglof* as setting forth a correct statement of law:

> The opinion as written may be read by judges and lawyers to stand for the proposition that summary judgment for the defendant is inappropriate where the plaintiff in an employment discrimination case presents a prima facie case. I do not believe this is, or should be, the law . . . . I do not believe that the fact that plaintiff has established a prima facie case in and of itself is sufficient to foreclose the granting of a motion for summary judgment.

Haglof v. Northwest Rehabilitation, Inc., 910 F.2d 492, 495 (Stuart, J., concurring). I find this to be in conformity to *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 89-4106-CV-C-5

WILMA HASE,
Plaintiff,

vs.

MISSOURI DIVISION OF EMPLOYMENT SECURITY
and BRUCE CORNETT,
Defendants.

ORDER

[Filed: June 3, 1991]

Before this Court is defendants' motion for summary judgment. Plaintiff's action alleges age and sex discrimination in failing to promote. Plaintiff is a female who, at the time of the promotion at issue, was fifty-seven years old. The person chosen for the promotion, Mr. Wendell Roger Otey, is a male who, at the time of the promotion at issue, was thirty-seven years old.

Defendants move for summary judgment on two grounds. First, defendants assert that plaintiff cannot meet her burden of producing evidence to support her position that defendants' legitimate, non-discriminatory reason for promoting Mr. Otey rather than plaintiff is pretextual. Second, defendants argue that plaintiff has failed to show just cause why she was not able to properly serve process on defendants within one hundred and twenty days after the filing of plaintiff's complaint. Finding that summary judgment must be granted on the first ground, this Court will not address the latter.

Facts

Defendant Missouri Division of Employment Security ("DES") hired plaintiff on January 6, 1958. Plaintiff has worked continuously for DES from that date to present. Plaintiff has worked at Deputy I, Deputy II, Claims Technician, and Employment Security Technician. None of these are deemed supervisory positions. From 1981 to 1987, plaintiff's job performance ratings have been consistently higher than those of Mr. Otey. Mr. Otey, by 1987, had held positions at DES as Deputy I, Employment Security Technician, Supervisor I and Supervisor II. The latter two are classified as supervisory positions.

In 1987, the position of Employment Security Manager I opened at the DES office in Mexico, Missouri. Plaintiff and Mr. Otey were both on the register of certified eligibles prepared by the Personnel Division of the Missouri Office of Administration. Based on test scores, plaintiff was third and Mr. Otey was sixth on this list of ten candidates. After considering experience, plaintiff was moved to second on the list.

Mr. Otey was selected by the Director of DES, Mr. Bruce Cornett, for the Manager I position in Mexico, Missouri. Mr. Otey is male and was, at the time of the selection, 37 years of age. Plaintiff is female and was, at the time of the selection, 57 years of age.

Mr. Cornett selected Mr. Otey on the recommendation of Mr. Jack Meystrick, the Assistant Director for Field Operations at DES. Mr. Cornett also discussed the selection of Mr. Otey with another assistant director and received a favorable report.

As Mr. Cornett understood the process, the ranking on the register of certified eligibles is irrelevant. Mr. Cornett believed that he was free to choose any person from the list. There are no written regulations or rules contrary to these beliefs. In making his selection, Mr. Cornett did not review the personnel files or

job performance ratings of either plaintiff or Mr. Otey. Nor did Mr. Cornett interview either of these candidates.

Mr. Meystrick recommended Mr. Otey for the Manager I position because Mr. Otey had had previous supervisory duties.

Standard for Summary Judgment

Fed. R. Civ. P. 56(c) requires "the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552-53 (1986). The burden on the party moving for summary judgment "is only to demonstrate . . . that the record does not disclose a genuine dispute on a material fact." *City of Mt. Pleasant, Iowa v. Associated Elec. Co-op.,* 838 F.2d 268, 273 (8th Cir. 1988).

Once the moving party has done so, the burden shifts to the non-moving party to go beyond his pleadings and by affidavit or by "depositions, answers to interrogatories, and admissions on file" show that there is a genuine issue of fact to be resolved at trial. *Celotex,* 477 U.S. at 323, 106 S.Ct. at 2553. Evidence of a disputed factual issue which is merely colorable or not significantly probative, however, will not prevent entry of summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2511 (1986).

Summary judgment, however, "is an extreme remedy, to be granted only if no genuine issue exists as to any material fact." *Hass v. Weiner,* 765 F.2d 123, 124 (8th Cir. 1985). In ruling on a motion for summary judgment, this Court must view all facts in a light most favorable to the non-moving party, and that party must receive the benefit of all reasonable inferences drawn from the facts. *Robinson v. Monaghan,* 864 F.2d 622, 624 (8th Cir. 1989).

If "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law," this Court must grant summary judgment. Fed. R. Civ. P. 56(c).

Discussion

The defendants concede, and the facts support, that there is sufficient evidence to support a prima facie case of age or sex discrimination in defendant's failure to promote plaintiff. Therefore, the burden of production shifts to defendants to show a legitimate, non-discriminatory reason for not promoting plaintiff. *Goetz v. Farm Credit Services,* 927 F.2d 398, 400 (8th Cir. 1991).

Defendants assert, and the exhibits support, that Mr. Otey was selected for the Manager I position at Mexico, Missouri, because he had previously worked in supervisory positions and Manager I was a supervisory position. Plaintiff had not worked for DES in a supervisory position. Supervisory experience for a promotion to a supervisory position is a legitimate, non-discriminatory reason. *Hale v. Cuyahoga County Welfare Dept.,* 891 F.2d 604, 606 (6th Cir. 1989).

Defendants having produced a non-discriminatory reason for promoting Mr. Otey rather than plaintiff, the burden now shifts to plaintiff to produce evidence that the proffered reason was pretextual. *Goetz,* 927 F.2d at 400. Such evidence need not be direct. Indirect evidence which shows that the defendant's proffered reason is not worthy of belief is sufficient. *Id.*

Plaintiff argues that Mr. Otey's supervisory positions did not require direct, hands-on supervision and that this is the type of supervision required as Manager I at the Mexico DES office. Additionally, defendant Cornett and Assistant Director Meystrick did not review Mr. Otey's job performance ratings or his personnel record.

However, neither defendant Cornett nor Assistant Director Meystrick reviewed any of the job performance ratings or personnel records of any of the eligible candidates. Defendant Cornett selected Mr. Otey almost solely on the recommendation of Assistant Director Meystrick and a favorable report from another assistant director. Assistant Director Meystrick recommended Mr. Otey because Mr. Meystrick knew of Mr. Otey's experiences, supervisory activities and a short stint as supervisor at the Mexico DES office.

This Court has searched the depositions and exhibits filed both in support of and in opposition to defendants' motion for summary judgment. Nowhere has this Court been able to find any evidence, direct or indirect, that defendants' reason for selecting Mr. Otey rather than plaintiff for the Manager I position in the Mexico DES office is pretextual. Where a plaintiff in a discrimination case is unable to produce evidence from which a discriminatory impetus may be inferred, summary judgment must be granted in favor or defendants. *Pierce v. Marsh,* 859 F.2d 601, 604 (8th Cir. 1988).

This Court can understand why plaintiff believes that she was discriminated against. Plaintiff has a long history at DES as an excellent employee. Her test score for the Manager I position was superior. Her job performance ratings were consistently superior with nothing but laudatory remarks from those performing the ratings. This Court could even agree that plaintiff's performance in the Manager I position would more than likely have excelled that of Mr. Otey.

Moreover, this Court could easily find that the method of review utilized by defendant Cornett was far from exemplary. Defendant Cornett did not bother to take into account the scores or job ratings of the candidates and did not check their personnel files for further information about the candidates' qualifications.

However, this Court's review is limited to determining if there is any evidence from which it can reasonably be inferred that plaintiff was discriminated against because of her sex or her age. No such evidence is before this Court. For this reason, it is therefore

ORDERED that defendants' motion for summary judgment is granted. It is further

ORDERED that plaintiff's complaint is dismissed with prejudice, each party to bear its own costs.

/s/Scott O. Wright
SCOTT O. WRIGHT
United States District Judge

June 3, 1991

Supreme Court, U.S.
AUG 8 1993

No. 92-1320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MISSOURI DIVISION OF EMPLOYMENT SECURITY
and C. BRUCE CORNETT,
Petitioners,

VS.

WILMA HASE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

Respondent objects to the presentation of the questions presented by the Petitioners. The question presented should be as follows:

1. Whether the Court of Appeals erred in determining that Respondent provided evidence to challenge Petitioners' articulated reason for their promotional decision and in determining that there is a genuine dispute of material fact concerning the ultimate issue of discrimination.

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STATEMENT OF THE CASE

Respondent Wilma Hase was first employed by Petitioner, Division of Employment Security (DES) on January 6, 1958. Petitioner C. Bruce Cornett was the Director of the Division and the "Appointing Authority" under Missouri law pursuant to Section 36.030 Revised Statutes of Missouri (R.S.Mo). The DES operates a number of local employment offices throughout the state and the agency is largely administered from a central office in the state capitol. Positions in the agency are filled pursuant to the state merit system law. Certain non-entry level positions are filled from a "promotional register" which is restricted to current

employees. Section 36.320 R.S.Mo. Respondent was on a list of eligibles for promotion to "Manager I" position. The eligible list or "register" was compiled by the Missouri Department of Personnel. (R.301) Examinations are conducted and graded. The numerical score on the exam is combined with a numerical score derived from consideration of education and experience. Veterans are given 5 points and disabled veterans are given 10 points. Section 36.220 R.S.Mo. Ranking on the registers is based on the combined scores. Respondent's score on the Manager I register was enhanced because of her "Highly Successful" performance appraisal and she was moved to the second ranking on the register. (R.302-304) When openings occur letters are sent to each person on the register to determine availability for the position in question. A position became open in the Mexico, Missouri office in 1987 for "E.S. Manager I." This was the top job in that office. Respondent was on the Manager I register and Respondent received such a letter inquiring as to her availability. She signed it on February 7, 1987, stating that she was available. (R.199-200). The Appointing Authority is to make the promotions based on merit and fitness from the top ten persons on the register. Section 36.150 R.S.Mo. and Section 36.030.3 R.S.Mo.

Respondent was 57 years of age when the promotional decision by Petitioners was made. She was the only woman in the top ten persons ranked on the register and ranked second. (R.17 and 232; 302-304) The candidate selected, Mr. Roger Otey, was 37 years of age, was a male and ranked sixth. He was the youngest on the register. He had been with the agency since 1973. (R.162) Mr. Otey was an African-American but race did not enter into the decision to promote him to this position and the promotion was not part of a quota or affirmative action program. (R.87) Respondent denies that the appointing authority (D. Bruce Cornett) "was free to select anyone among the top ten on the list of eligibles" as stated in Petitioners' Statement of The Case (p. 3). Respondent contends that the Petitioners were bound to consider

the rankings in the appointment and to appoint on the basis of merit and fitness pursuant to the merit system law.

There was nothing in the listed qualifications for the Manager I position which required prior supervisory positions with the agency. The qualifications listed were: Five years of technical or professional public contact work, including one year with the Division of Employment Security at the level of Employment Service or Claims Supervisor I, or two years at the level of Employment Security Technician or a Claims Technician. College education with specialization in the social sciences, public, personnel, or business administration, or in closely related areas may be substituted on a year-for-year basis for the required non-specialized experience, up to a maximum of four years. (R.31) During Hase's employment with the agency she had made two previous applications for supervisory positions and each time did not receive an interview or a call pertaining to the applications submitted. (R.31) Respondent had attended seminars and training sessions for management and supervision: "Basic Supervision," Breech Academy, Kansas City, Missouri; "Basic Supervision For Public Service," Office of Administration, State of Missouri; "Management and Supervision," Office of Administration, State of Missouri; and "Human Relations," University of Colorado, Boulder, Colorado. (R.300) She further testified (by affidavit) that from 1975 through 1986, she had "in excess of 1,300 hours, the equivalent of over 33 weeks, in management, supervision and training responsibilities as set out on her time distribution sheet which is prepared weekly for the Missouri Division of Employment Security under the 600 code, which code is for management, supervision and training, and allocates how her weekly time is spent." (R.300)

Petitioners admit in their Answer that Respondent "met the minimal qualifications for the position." (R.12) The District Court found that: "The defendants concede, and the facts support, that there is sufficient evidence to support a *prima facie*

case of age or sex discrimination in defendant's failure to promote plaintiff." (A.17)

Cornett, the appointing authority, never reviewed any candidate's (eligibles on the "register") individual personnel files, performance appraisals, exam scores and conducted no interviews prior to appointing Mr. Otey. (R.70-71; 84-85) The criteria testified to by Cornett for making appointments was: "Who's going to get the job done. Who is going — if its a position that's been very well managed or handled in the past, we got to get somebody that at least maintains that or improves it and that's the criteria. That really ends up to getting down to the gut feeling as to who can handle that particular job." (R.72-73)

Petitioners' Statement of The Case recites that "Hase conceded that it would be reasonable for a person making an appointment to consider prior experience in supervisory positions when making an appointment to a supervisory position." The Petitioners cite the Record at (R.67-68, 111). This is incorrectly quoted and incorrectly cited to the Record. The Record at 241 reveals the following questions propounded by Mr. Farmer and answers of Wilma Hase:

Q. "In managing an office or in being considered for any management position, would you agree that prior supervisory and management position is an important factor to consider?

A. It's not a requirement on the job description for ES Manager I for the Personnel Division.

Q. Would you agree that it could be an important factor to consider —

A. Yes.

Q. — prior supervisory management positions.

A. Yes.

Q. And you have held no prior management or supervisory positions under the merit system, have you?

A. Not in the —

Q. And Mr. Otey had held management and supervisory positions under the merit system; is that right?

A. I don't know."

(R.241-242)

Respondent also produced evidence that she had qualifications which the first ranked person on the register did not have: "He would not have been knowledgeable of the economic conditions, the employment problems and practices, the labor pool in the areas whereas I would have been." (R.243) Hase was a resident of Mexico, Missouri, the location of the Manager I job in question, and had 12 years experience working in the Mexico, Missouri office. (R.299)

With regard to her own qualifications as opposed to Mr. Otey's Respondent testified: "I had a higher score, test score, I had more actual on-the-job experience, supervisory experience even though I did not have the job title than Mr. Otey. I'm well qualified and knowledgeable of the community that the job opening existed in." She further stated: "I have knowledge of the Unemployment Insurance Section, the Employment Service Section, the Employer Contact Section. My qualifications are very much better than his." (R.211) Later she testified: "I have wide knowledge of all the programs in the Employment Security Section. I have the unemployment insurance background which Mr. Otey did not have any knowledge of. I was the counterpart of the Employment Service Claims Supervisor in Columbia for 12 years in Mexico which Mr. Otey doesn't have." (R.213)

Respondent testified in her deposition that defendant Cornett had made statements to another employee that he "wanted to get rid of all of the old people." (R.229-230)

SUMMARY OF THE ARGUMENT

The Court should deny this Petition. Petitioners' contention (in Reasons For Granting The Writ) that the decision of the Eighth Circuit "ignores the Court's holding concerning the appropriate function of summary judgments and removes any possibility that an employment discrimination defendant in a disparate treatment case can secure a summary judgment" is not supportable. The second contention that the "circuit court's opinion overlooks and attempts to eliminate the fourth element of a *prima facie* employment discrimination case created by this Court" is likewise unfounded. In Petitioners' Point I they contend that a plaintiff's minimum qualifications must address the legitimate reason for the employment decision. This assertion is not supported by any decision cited by Petitioners. Finally, in Point II, Petitioners contend that the decision below holds that the fourth element of the *prima facie* case can be established by showing only the minimal qualifications for the job sought.

Petitioners have waived the right to now raise the argument that the fourth element of the *prima facie* case was not satisfied by Respondent in the case below. The District Court made a finding that the Petitioners had conceded, and the plaintiff had proven, a *prima facie* case that the promotional decision was based on age or sex. The Petitioners failed to file a cross appeal on this issue in the Court of Appeals.

The decision of the Eighth Circuit Court of Appeals is not in conflict with the decisions of another court of appeals on the same matter; it is not in conflict with a decision of this Court; it is not in conflict with a state court of last resort in Missouri; it has not departed from the accepted and usual course of judicial proceedings or sanctioned a departure by the District Court so as to call for the exercise of this Court's power of supervision. Finally, the Court of Appeals has not decided an important question of federal law which should be decided by this Court or

decided a federal question in a way that conflicts with the applicable decisions of this Court. On the contrary, the decision of the Court of Appeals is well reasoned and is in harmony with the decisions of this Court as enunciated in *McDonnell Douglas v. Green,* 411 U.S. 792 (1973); *United States Postal Serv. v. Aikens,* 460 U.S. 711 (1983) and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

It is clear from the record as a whole that there are genuine disputes of material fact in this case. Petitioners cite numerous cases which when examined provide no conflicting statements of the law with the case at bar.

The fact that the employer has articulated only one reason for the selection of Mr. Otey over the Respondent (the reason being that he had previous supervisory experience) looks lame when it is shown that supervisory experience was not listed on the job description. When Respondent's qualifications (which are based on objective proof such as exam scores, performance appraisals, work history, variety of experience, training, knowledge of office functions, knowledge of the community served by the office, overall years of service, and, above all, her ranking on the register) are matched against Mr. Otey's, he does not measure up. Respondent's superior qualifications renders the Petitioners' whole argument about "relatively similar" qualifications specious and moot.

The facts of record do not support a case for hypothetical review as suggested in Petitioners' Petition at page 21 and no case of hypothetical review merits the attention of this Court.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR IN DETERMINING THAT RESPONDENT PROVIDED EVIDENCE TO CHALLENGE PETITIONERS' ARTICULATED REASON FOR THEIR PROMOTIONAL DECISION AND IN DETERMINING THAT THERE IS A GENUINE DISPUTE OF MATERIAL FACT CONCERNING THE ULTIMATE ISSUE OF DISCRIMINATION.

A. The Decision of The Eighth Circuit Is Not In Conflict With Decisions Of Other Circuit Courts Of Appeal Or With This Court.

This is a disparate treatment case. The decision below is not in conflict with decisions of other circuits or with this Court. Petitioners ignore the findings of the Eighth Circuit that substantial evidence exists from which a trier of fact could infer that Petitioners' articulated reason for their employment decision was pretextual.

The decision below is firmly grounded in the decisions of this Court, particularly *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), *United States Postal Serv. v. Aikens*, 460 U.S. 711 (1983) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The Eighth Circuit's analysis of the application of the *McDonnell Douglas* formula, as is applied to the facts of this case, is succinct and unambiguous:

> A defendant who articulates a legitimate, nondiscriminatory reason overcomes the presumption of discrimination raised by the *prima facie* case, *United States Postal Serv. v. Aikens*, 460 U.S. 711, 715 (1983) (quoting *Burdine*, 450 U.S. at 255), and the case must proceed to the third stage of analysis. At the third stage, the plaintiff must demonstrate that the defendant's proffered reason is mere pretext, "either directly, by persuading the court that a discriminatory

reason more likely (than not) motivated the employer, or indirectly, by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. This burden "merges with the (plaintiff's) ultimate burden of persuading the court that she (or he) has been the victim of intentional discrimination." *Id.* (A.7-8)

* * *

As the *Burdine* Court recognized, "(the plaintiff's initial evidence) and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." 450 U.S. at 255 n. 10. Evidence of Plaintiff's rank, her higher examination and performance ratings, and her years of experience, when compared with Otey's supervisory experience and job recommendations, could reasonably lead a trier of fact to infer that Defendants' proffered reasons were pretextual.

Plaintiff does not merely assert that she has been discriminated against and that Defendants are not telling the truth. She provides evidence to challenge Defendants' articulated reason for their promotional decision. To grant summary judgment would be inappropriate on this record, especially because this disparate treatment case is based largely on circumstantial evidence and the relative merit of each party's case depends significantly on credibility. Consequently, we hold that there is a genuine dispute of material fact concerning the ultimate issue of discrimination. (A.9)

Petitioners have not shown that the decision of the Eighth Circuit is in conflict with the decisions of this Court or of the

other circuits. Petitioners depart from their previous position taken in the District Court. Instead of focusing on step three of the *McDonnell Douglas* analysis, they shift to step one and state that a *prima facie* case has not been shown. In particular, they state that the fourth element of the *prima facie* case has not been demonstrated. This will be discussed in part B. below.

B. The Decision of The Eighth Circuit Does Not Hold That The Fourth Element Of A *Prima Facie* Case In A Promotion Case Can Be Established By Showing Only The Minimal Qualifications For The Job.

Petitioners contend that the Eighth Circuit has rendered a decision which holds that the *prima facie* case can be demonstrated by only showing that the plaintiff is minimally qualified for the job. There is nothing in the decision to support this contention.

Petitioners have raised new issues in this Court which had been conceded by them in District Court. These issues were not properly appealed in the Court of Appeals. The District Court made a specific finding that the "defendants concede, and the facts support, that there is sufficient evidence to support a *prima facie* case of age or sex discrimination in defendant's failure to promote plaintiff." (A.17) Petitioners' focus at the District Court was on the third step of the *McDonnell Douglas* analysis wherein they contended that the Respondent had shown no evidence of pretext. Now Petitioners contend that the evidence of Respondent's qualifications was insufficient to establish a *prima facie* case. The record in this case however, demonstrates that Respondent's qualifications were *superior* to those of the candidate chosen. The fact that Respondent scored higher on the exam, was ranked higher on the register, had superior performance appraisals, had supervisory training, more years of experience and more varied experience in the job functions undertaken in the seven person local office over which she would be in charge, all demonstrate Respondent's superior qualifications.

These facts render Petitioners' arguments about "relatively similar" qualifications specious and moot.

Petitioners also contend that Respondent's evidence of minimal qualifications for the job do not address the legitimate reason for the employment decision. There is no decision of this Court or any Court of Appeals which holds that the elements of the *prima facie* case — step one — must address or defeat the "legitimate reason" articulated by the employer for the employment decision. This would require some degree of clairvoyance on the part of the employee. Petitioners confuse an employee's duty to produce evidence of pretext with their threshold duty to demonstrate a *prima facie* case. If Petitioners' contention was to become law, an employer would be able to pick out some job qualification which the candidate does not possess and hold it up as justification for not hiring that candidate. A rule such as this would guarantee the employer's success in foisting a pretextual reason on the EEOC and the courts.

In the record below the Petitioners made no showing that "supervisory experience" or the prior holding of a "supervisory position" was a pre-requisite for the Manager I job. The articulation of this sole reason as justifying the promotion of Mr. Otey, could alone lead a trier of fact to conclude that the reason given was pretextual. Petitioners would have it that any reason articulated by an employer is conclusively "legitimate" or conclusively "nondiscriminatory". That is a contention diametrically opposed to the decisions of this Court in *Burdine, supra*, and *McDonnell Douglas, supra*.

Finally, Petitioners present (at page 21 of their Petition) a hypothetical case involving a hiring situation in the context of a college setting. This hypothetical case is in no way analogous to the case at bar. In the hypothetical case, the candidate chosen had qualifications superior to the complaining candidate. The record in this case demonstrates that Respondent out-performed Mr. Otey in every objective measurement of employee performance,

experience and ability which the state merit system of examination, grading and ranking provided. The Petitioners ignored all of the objective criteria provided them by the state merit system and articulate one lone reason for their selection of Mr. Otey. Petitioners seek to ask this Court to hear this case on hypothetical facts which bear no relation to the facts adduced in this record.

This Court held in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) that the shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the "plaintiff (has) his day in court despite the unavailability of direct evidence." Considering this record, the "full and fair opportunity" (*McDonnell Douglas, supra,* at 804-805 n. 18) to demonstrate that the employer's stated reason for the employee's rejection is pretextual, can only be accomplished in a trial.

CONCLUSION

The law pertaining to the issues raised in this case is well settled and needs no clarification. Summary judgment is not appropriate in this case because the Respondent has adduced facts which would allow a trier of fact to infer that the Petitioners' articulated reason for the employment decision to promote Mr. Otey over the candidacy of the Respondent is pretextual. There is a genuine dispute of material fact concerning the ultimate issue of discrimination. This case does not merit the Court's review. The Petition should be denied.

Respectfully submitted,

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